

No. SC85137

IN THE
MISSOURI SUPREME COURT

CHESTER JAMES TOLLIVER

Respondent,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI

Appellant.

Appeal from the Taney County Circuit Court
The Honorable Tony W. Williams, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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Statutes and Rules

Section 577.041 RSMo	10, 12, 14
Rule 73.01(c)	9, 16

JURISDICTIONAL STATEMENT

Respondent adopts Appellant's jurisdictional statement.

STATEMENT OF FACTS

On December 16, 2001, Officer James Eaton of the Hollister Police Department was dispatched to a residence in Hidden Valley trailer court regarding an assault complaint (LF 19). Officer Eaton's incident report indicates the complaint was reported at 11:30 p.m. (LF 18), but does not state when he made contact with the complaining witness (LF 12, 18 & 19). Officer Eaton spoke with Wayne Watson, who told him that he had been assaulted by James Chester Tolliver (LF 19). Officer Eaton's report contains a statement, presumably made by Mr. Watson, which reads, "He also stated that he was drunk." (LF 19). Hollister police officer Preston Schmidt reported that he arrived at the residence at approximately 10:53 p.m. and was instructed by Officer Eaton to take witness statements, whereupon Officer Eaton left Watson's residence to go to Tolliver's residence (LF 19, 20).

Although Officer Eaton's incident report does not indicate a time of arrival at Tolliver's residence (LF 18, 19), the Alcohol Influence Report (AIR) seems to show a time of initial contact of 11:27 p.m. (LF 12). The AIR also shows a time of arrest of 11:30 p.m. (LF 12), which is the same time shown in the incident report for when the assault was actually reported (LF 18).

Upon arrival, Tolliver was observed to be standing on his back porch with a drink in his hand (LF 19). Officer Eaton asked Tolliver what had happened at Hidden Valley and Tolliver indicated he did not know what he was talking about (LF 19). Tolliver then attempted to take a drink from his glass, which was then knocked out of his hand by an officer (LF 19). When again asked about Hidden Valley, Tolliver indicated that he had

damaged his own vehicle, that he had been home between thirty minutes and an hour and that he had some drinks after arriving home (LF 19, Tr. 5). Officer Eaton indicates he requested Tolliver to take some field sobriety tests and that Tolliver refused (LF 19). Tolliver was then arrested for Driving While Intoxicated and other charges (LF 19). The time of arrest is noted to be 11:30 p.m. at Tolliver's residence (LF 12). Officer Schmidt notes that after he completed his oral interview of the witnesses back at Hidden Valley, he was then advised by Officer Eaton that Tolliver was already in custody (LF 21).

Officer Eaton reports that after Tolliver's arrest, he transported him to the Branson Police Department for a breath test (LF 19). Officer Eaton indicates that upon arrival at the police station, he read the implied consent warning and Tolliver refused the test (LF 19). The AIR indicates the implied consent was read to Tolliver at 11:30 p.m. (LF 14).

The AIR also indicates that Officer Eaton attempted to obtain the breath sample using a Datamaster (LF 14). Officer Eaton checked all boxes pertaining to the procedure when obtaining a breath sample using the Datamaster, but no printout was attached to the report or included in the legal file (LF 14).

At some point, Officer Eaton also issued two citations to Tolliver for Driving While Intoxicated and Leaving the Scene of an Accident, both of which indicate a time of occurrence for both offenses as 11:30 p.m. (LF 22).

Tolliver was given notice that the Director of Revenue intended to revoke his license for one year for allegedly failing to submit to a chemical test to determine his blood alcohol content and Tolliver then filed a Petition for Review on December 26, 2001

(LF 3, 4) On January 31, 2002, a hearing was held (Tr. 2-7). The certified records of the Director were admitted into evidence over Tolliver's objection (Tr. 2). No officer or other witness testified for the Director. Tolliver testified that he had not drank alcohol until after arriving back at his home and that he estimated he had been home forty-five minutes to an hour before the police arrived (Tr. 4, 5). The trial court entered judgment in favor of Tolliver, finding no probable cause for his arrest (Tr. 7, LF 25). The Director appealed and the Southern District reversed and remanded with directions to reinstate Tolliver's license suspension. Tolliver sought and was granted transfer by this Court.

POINT RELIED ON

The trial court did not err in setting aside the suspension of Respondent’s driving privilege because the Director did not meet his burden of showing that the officer had sufficient probable cause to arrest Respondent for driving while intoxicated at the time the arrest occurred in that there was insufficient evidence that Respondent was intoxicated at the time he operated his vehicle, due to the lapse in time between the accident and contact with the arresting officer.

<i>Domsch v. Director of Revenue</i> , 767 S.W.2d 121 (Mo. App. W.D. 1989)	12, 15
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ARGUMENT

The trial court did not err in setting aside the suspension of Respondent's driving privilege because the Director did not meet his burden of showing that the officer had sufficient probable cause to arrest Respondent for driving while intoxicated at the time the arrest occurred in that there was insufficient evidence that Respondent was intoxicated at the time he operated his vehicle, due to the lapse in time between the accident and contact with the arresting officer.

Standard of Review

With respect to appellate review of judgments relating to the revocation of driving privileges, the trial court will be affirmed unless there is no substantial evidence to support its decision, its decision is against the weight of the evidence or it erroneously declares or applies the law. *Hawk v. Director of Revenue*, 943 S.W.2d 18, 19-20 (Mo. App. S.D. 1997) citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). This standard applies equally in cases that are submitted “on the records” and the appellate courts will defer to the trial court as the finder of fact in determining whether there is substantial evidence to support the judgment and whether the judgment is against the weight of the evidence. *Reece v. Director of Revenue*, 61 S.W.3d 288, 291 (Mo. App. E.D. 2001). In determining whether the trial court's decision is based on substantial evidence, the reviewing court must defer to the trial court on factual issues and cannot substitute its judgment for that of the trial judge. *Hawk* at 20. Deference to the trial judge applies equally to his determination of the credibility of witnesses and to his conclusions. *Id.* The

reviewing court should review the evidence in the light most favorable to the trial court's judgment and should deem all facts to have been found in accordance with the result reached by the trial court. *Id.*

Burden of Proof and Probable Cause

When reviewing a suspension under Section 577.041.4 RSMo for refusing to take a chemical test, a trial court shall determine:

- (1) Whether or not the person was arrested or stopped;
- (2) Whether or not the officer had:
 - (a) Reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated or drugged condition; ...
- (3) Whether or not the person refused to submit to the test.

If the court determines any of these issues not to be in the affirmative, the court shall order the director to reinstate such person's driving privilege, **which means the director bears the burden of proof at the hearing.** *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 620 (Mo. banc 2002)(emphasis added). When the trial court does not issue findings of fact and conclusions of law, "All fact issues upon which no specific finding are made shall be considered as having been found in accordance with the result reached." *Hinnah* at 621, citing *rule 73.01(c)*. Even if the evidence presented at the hearing could support a finding of probable cause, the trial court is free to draw the conclusion that there was no probable cause based on the court's assessment of witness credibility or upon the

assessment of the evidence of probable cause as to intoxication. *Hinnah* at 622.

In this case, the trial court found the second requirement of Section 577.041 RSMo to be lacking, specifically that there was no probable cause to believe Swanberg was driving a vehicle *while* intoxicated (emphasis added). Since no witnesses testified on behalf of the Director, the certified records are the only evidence upon which the Director relies in asserting that the decision of the trial court was in error.

"Probable cause to arrest exists when the arresting officer's knowledge of the particular facts and circumstances is sufficient to warrant a prudent person's belief that a suspect has committed an offense." *Hinnah* at 621. Mere suspicion is insufficient to establish probable cause, but absolute certainty is not required. *State v. Wilcox*, 842 S.W.2d 240, 244 (Mo. App. W.D. 1992). Probable cause is a fluid concept which turns on the assessment of probabilities applied to particular facts. *Id.* Facts needed for probable cause are found in the definition of the offense and in case law dealing with the sufficiency of evidence to convict a person of that offense. *Id.* at 243.

In order to satisfy the second part of Section 577.041.4, the Director bears the burden of demonstrating probable cause to believe Tolliver was driving *while* in an intoxicated condition (emphasis added). The plain language of the statute shows that it is not simply sufficient for the arresting officer to acquire knowledge of driving, but to also acquire knowledge that the driver was intoxicated *at the time* he was driving.

The Officer Lacked Probable Cause to Arrest

The narrow question presented to this Court is essentially whether probable cause

exists to arrest a driver for driving while intoxicated when he leaves the scene of an accident and is later found intoxicated at another location, without credible evidence he was intoxicated at the time of the accident. It is undisputed that Tolliver drove the vehicle and was drinking when found almost two hours later by the officer, but there was no credible evidence known by the officer at the time of the arrest that would have amounted to probable cause to believe Tolliver was intoxicated at the time he was driving.

This Court's decision in *Hinnah v. Director of Revenue*, 77 S.W.3d 616,622 (Mo. banc 2002) states that the relevant question under Section 577.041 RSMo is:

“...whether the officer who requested the test had reasonable grounds to believe that [Driver] was driving *while* intoxicated.” (emphasis added).

The Southern District essentially would not require that the officer acquire or attempt to acquire any knowledge, after a driver leaves the scene of an accident, of when the alcohol was consumed, citing the Eastern District's decision in *Howard v. McNeill*, 716 S.W.2d 912, 914-15 (Mo. App. E.D. 1986). Instead, the court would place the burden on the driver to show there was not probable cause to believe his intoxication occurred at the time he was driving, in other words, that he was *not* driving while intoxicated. As previously stated, this is directly contrary to the wording of Section 577.041 RSMo., which states that the burden is on the Director to establish probable cause to believe the driver drove *while* intoxicated.

The Western District's decision in *Domsch v. Director of Revenue*, 767 S.W.2d 121 (Mo. App. W.D. 1989) directly contradicts the Southern District's holding in the case at bar and the Eastern District's holding in *Howard*. In *Domsch*, the driver had an accident with another party and then left the scene. An hour and forty minutes later, the driver was found by the officer in a restaurant eating a meal and he appeared to be intoxicated. The Court upheld the trial court's determination that no probable cause existed for the arrest of the driver.

“The Director must prove that Officer Harris had probable cause to believe that respondent was operating his vehicle while under the influence at the time of the traffic accident.” *Id.* at 123.

The Court goes on to state:

“Simply put, at the time of respondent's arrest, Officer Harris could not have known of respondent's condition at the time of the accident.” *Id.* at 123, 124. “The fact remains that there was no evidence that the respondent was intoxicated at the accident scene some one hour and forty minutes earlier.” *Id.*

In another Western District case, *Nightengale v. Director of Revenue*, 14 S.W. 3d

(Mo. App. W.D. 2000) the Court found the officer did not have probable cause to arrest for driving while intoxicated where no evidence was offered regarding the length of delay between the accident from which driver purportedly fled and her arrest or where she was and what she was doing when arrested.

The language in these cases is almost identical to the language found in *Hinnah* wherein this Court points out that the officer did not have knowledge of the “recency, quantity or quality of the alcohol” on the driver’s breath. *Id.* at 619. See also *State v. Liebhart*, 707 S.W.2d 427 (Mo.App. W.D. 1986), overturning a conviction for driving while intoxicated based on the lack of any evidence establishing the time or place of consumption of alcohol, even though the officer arrived at the scene of a one car accident, found one set of tire tracks in the snow leading to the vehicle and found defendant alone behind the wheel.

The Southern District’s decision is also in conflict with the Western District’s recent decision in *Verdoorn v. Director of Revenue*, — S.W.3d —, WD 60784, 2002 WL 31452804 (Mo. App. 2002). *Verdoorn* overruled prior decisions in the Western District and declined to follow decisions in both the Southern and Eastern district regarding the improper shifting of the burden of persuasion to the driver after the Director presented a prima facie case. Although not decided upon probable cause, *Verdoorn*’s significance in the case at bar is the reaffirmation that under Section 302.500 RSMo, the Director has the burden of production to present evidence that the driver was arrested upon probable cause to believe he was driving while intoxicated. *Id.* at 3. This burden is an identical

requirement under Section 577.041 RSMo.

Hinnah is similar to the case at bar. Both cases involve an officer who encounters a licensee who is not driving at the time of the initial encounter. Both involve a significant or unknown lapse of time between the alleged driving, and the time the officer makes any observation of the licensee. Both involve an admission by licensee that he was driving at an earlier time. Finally, both involve an officer who believed, based on his observations of the licensee's demeanor, that there was probable cause to believe licensee was intoxicated. This Court emphasized the wording of Section 577.041 and the fact that the Director bears the burden of proof. *Hinnah* at 620.

Taken to the extreme, the Director's attempt to shift the burden to the driver would mean that after a driver, suspected of being in an accident, is found at his home or other location two days afterward and is found to be intoxicated, the driver is subject to arrest for driving while intoxicated and a license revocation, whether he refuses to submit to a chemical test or tests in excess of the legal limit. Obviously, when there is an unknown lapse of time or a known significant period of time between when the driver was alleged to have driven and when he is found in an intoxicated state, evidence must be found by the officer to establish what the driver was doing between the time he was deriving and then subsequently found to be intoxicated, otherwise the evidence fails to establish probable cause. *Domsch* at 123; *Nightengale* at 270. The Director failed to meet his burden.

This case was transferred from the Southern District with *Swanberg v. Director of Revenue*, SC85124, as both involve a situation in which a driver left the scene of an

accident and was found a significant period of time later at another location, having drank alcohol at some point. However what differentiates the two cases to some extent is that in this case, there are a significant number of controverted facts.

First, the Southern District in its opinion sets out the reports of officer Schmidt and Eaton, but acknowledges that officer Schmidt's report is irrelevant to whether officer Eaton had probable cause at the time of arrest because there is no indication any of what officer Schmidt learned was communicated to officer Eaton. *Howard v. McNeill*, 716 S.W.2d 912, 915 (Mo.App. E.D.1986). However, when discussing what information was available to officer Eaton prior to arrest, the court refers to information contained in officer Schmidt's report as facts supporting probable cause to arrest (p. 8).

Moreover, the Southern District indicates that it is "a reasonable inference" that Officer Eaton knew facts relevant to whether there was probable cause to arrest for the crimes of assault and leaving the scene of an accident. Whether there was probable cause to arrest for some other crime is absolutely irrelevant to the inquiry in this case. *Hinnah* points out that the requirement under Section 577.041 RSMo is that the director show "Reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated or drugged condition". *Id.* at 622. This cannot be interpreted to mean probable cause to believe *any* crime occurred.

Controverted Facts

If Officer Schmidt's report is not considered, then the only fact cited by the Director to justify Tolliver's arrest for driving while intoxicated is a purported statement by

an alleged witness, Wayne Watson, in Officer Eaton's narrative report. The report states, "He also stated that he was drunk." Tolliver contends, and the trial judge was free to believe, that this statement is an admission by Watson that he was in fact intoxicated, referring to himself and not Tolliver. Submission of cases on records alone poses risks, including "the inability to explain discrepancies or to rehabilitate 'witnesses' ..." *Jarrell v. Director of Revenue*, 41 S.W.3d 42, 46 (Mo. App. S.D. 2001).

The Southern District ignored the mandate of *Hinnah* and *Rule 73.01(c)* and substituted its own interpretation of the statement instead of interpreting the evidence in accordance with the result reached. Furthermore, since the officer did not testify, no clarification of the report was presented at the hearing. In essence, the Southern District argues that the facts are uncontroverted yet chooses the Director's interpretation of the report versus Tolliver's interpretation. Since *Hinnah* holds that the trial court is "free" draw the conclusion there was no probable cause upon its assessment of the evidence, the Southern District's holding cannot stand.

There are also other unexplained discrepancies. No officer was available to explain the numerous disparities in the officer's report regarding the times of certain events. In addition, officer Eaton's narrative report does indicate that he observed any sign of impairment or intoxication when he made contact with Mr. Tolliver. The observations on the first page of the alcohol influence report do not specify when they were noted by the officer, but since he arrested Mr. Tolliver almost immediately, it is reasonable to assume they were made after the arrest, which would be consistent with the trial court's decision

that there was no probable cause for the arrest. Since no officer testified and explained the report, it is difficult to understand the Southern District's conclusion that the evidence was "uncontroverted". The Director has the right to call the officer to the stand to explain his report, but when he chooses to submit on the records instead, he runs the risk of an inability to explain discrepancies or to rehabilitate 'witnesses' *Jarrell* at 46. Under *Hinnah*, the trial was "free" to draw the conclusion regarding witness credibility and that there was no probable cause for the arrest. *Id.* at 622.

CONCLUSION

Based on the foregoing, there was substantial evidence to support the decision of the trial court to reinstate Tolliver's driving privilege and the decision is not against the weight of the evidence, nor did the trial court misapply the law; therefore the judgment of the Southern District should be reversed and the decision of the trial court to reinstate Tolliver's driving privilege should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document and one disk containing the forgoing brief were placed in the U.S. Mail, postage prepaid, to State Solicitor James Layton, P.O. Box 899, Jefferson City, Missouri 65102-0899, on this _____ day of June, 2003.

I hereby certify that this brief complies with the limitations contained in Rule 84.06(b), this document contains 3,763 words and that the enclosed disk has been scanned for viruses.

David S. Akers